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NO. 80-1758

In the Supreme Court of the United States

OCTOBER TERM, 1980

JEROME W. HARPRING,
Petitioner

versus

CONTINENTAL OIL COMPANY (CONOCO),
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in an age discrimination in employment case the defendant corporation has met its burden by offering no specific objective proof of the plaintiff's "inadequate performance."

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1980

NO.

JEROME W. HARPRING,
Petitioner

versus

CONTINENTAL OIL COMPANY (CONOCO),
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered October 16, 1980.

OPINIONS BELOW

The U.S. Court of Appeals for the Fifth Circuit affrimed the U.S. District Court judgment in a written opinion dated October 16, 1980 (Appendix A); the petitioner - appellant moved for a rehearing on October 27, 1980 (Appendix B), which was denied by the Fifth Circuit on January 21, 1981 (Appendix C). The U.S. District Court memorandum of decision (Appendix D) and judgment (Appendix E) was entered on July 11, 1979.

GROUNDS FOR JURISDICTION

Petitioner seeks review by this Court of the Fifth Circuit opinion pursuant to Rule 17.1(c) of the Rules of the Supreme Court and 28 U.S.C. 1254(1). The original suit was filed in the District Court under the Age Discrimination in Employment Act, 29 U.S.C. 623(a)(1).

STATUTES INVOLVED

29 U.S. C., Sec. 623(a) provides:

(a) It shall be unlawful for an employer - -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
(3) to refuse the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

Petitioner Harpring, a forty-eight year old engineer, was hired by respondent CONOCO corporation as senior process engineer in October 1974 and involuntarily discharged in July 1977.

CONOCO contended that petitioner had failed to supervise younger engineers and that his design work was faulty. Harpring, then 50 years of age, charged a violation of the ADE Act, 29 U.S.C. 621 et seq. and that since 1974 CONOCO had established a pattern and practice of age discrimination against older professional employees at the Aberdeen, Mississippi, chemicals plant. (The chemical plant was one of five chemical plants in the relatively small chemical division of the large petroleum company.)

At the trial, petitioner presented proof that soon after he was hired a younger plant manager, Mr. Gamblin, was sent to manage the plant and that the CONOCO director of manufacturing advised that, "there were too many people, possibily" at

the Aberdeen plant, and it "wasn't structured right."

Mr. Gamblin introduced a new "second level" performance evaluation scoring system whereby a management team gave the final evaluation score. That system was consistently used to downgrade the older professionals and upgrade the younger engineers. A U.S. Department of Labor officer tesitified that in addition to lowering the evaluation scores of older (protected age group) professional employees as opposed to younger professionals, the "second level" review was responsible for the discharge of four older professional employees. No younger professional were terminated via the second level review.

From November 1, 1974, to August 1, 1977, thirteen changes were made in management positions, resulting in a decline in the average age of incumbents from 45.2 years to 35.3 years. The average age of process engineers declined form 40.8 years to 27.1 years, and the average age of all professional employees discharged for the stated reason of "indequate performance" was 50.2 years. (The trial judge would not allow petitioner to examine the other older engineers regarding their discharge by respondent company.)

In 1977 CONOCO issued a report to its stockholders that this "youth trend" in the CONOCO chemicals division would continue.

Four engineers formerly connected with the company described Mr. Harpring's competence and good performance, especially his design work, and another one, still employed by CONOCO, testified that Mr. Harpring was chiefly responsible for doubling the production of the plant at Aberdeen.

CONOCO offered testimony form management officials that Mr. Harpring failed to supervise "junior" process engineers, and subjective opinions regarding his "shallow" design work. No documentary examples of alleged inadequate work were submitted by the company. Petitioner presented two of the "younger" engineers formerly with the company who denied that they had been assigned to be supervised by petitioner. (The two less experienced engineers still with the company at the time of the trial, were not produced by CONOCO.)

Petitioner contended that substantial and preponderant evidance indicated that the CONOCO chemical division plant at Aberdeen prosecuted a "youth trend" and that he was a victim of that trend.

ARGUMENT

The trial judge found essentially that it was not necessary for the respondent company to present evidentiary items of

poor performance on the part of engineer Harpring and that oral testimony by plant management officials was sufficient to meet the defendant company's burden of proof of inadequate performance. The trial judge did recite the statistical evidence of a "pattern and practice" of age discrimination produced by petitioner, in his memorandum of decision, but that *"CONOCO had successfully defended by stating a legitimate, nondiscriminatory justification for the discharge, and that Harpring had failed to show that the stated reason was a mere pretext for discharging him on the basis of his age."* (Emphasis added. Fifth Circuit opinion, Appendix A).

Harpring appealed to the Fifth Circuit contending that if an ADE Act defendant could overcome substantial "pattern and practice," and "good performance" evidence by mere articulation from the same officials charged with the discrimination, there would be no way a discrimination plaintiff could prevail in a discrimination case. (Except, of course, in those relatively rare cases where age, sex or race had been mentioned as a cause for the action by company officials.)

Some examples of the consequences of not requiring some relevant evidence of the company were described in petitioner's brief (Appellant's Reply Brief, p. 7-8)

> 1. If Mr. Harpring's supervisory authority over four "junior" engineers really was restored in September 1976, why weren't the two engineers still with

the company asked to testify to that when they were both located about one mile form the courtroom? (The two who had left the company testified that they were not supervised by Mr. Harpring.)

2. If Mr. Harpring's supervisory authority really was restored, why was this kept secret from Mr. Harpring? (Mr. Michels: "I did not talk to Jay about it.") (T. 469, L.1)

3. If Mr. Harpring's engineering designs were "shallow and incomplete, "why weren't some of them presented for examination by the plaintiff and the court? (Should the burden be placed on the plaintiff to introduce his designs to prove that they were *not* "shallow and incomplete"?)

4. If Mr. Harpring's designs and work performed toward developing machinery and equipment really were deficient, how could these machines be "all working out at the plant making money for CONOCO"?

5. If Mr. Harpring's performance was not satisfactory to his supervisors "from the very first," according to Judge Smith (Record Excerpts, p. 23), why was that kept secret from Mr. Harpring for almost two years?

6. Why did CONOCO officials wait until January 1977, after Mr. Harpring's evaluation had been downgraded to a "5" to start "building a file" on him?

A process enineer deals with realities - machinery, tools, formulas - that either work or do not work. The proof of an engineer's prowess is that the machines do the work well and are producing profitably for the company. The plaintiff furnished this proof.

> Words and phrases used by the defendant in its brief to criticize the work of the plaintiff, i.e., "confused," "poorly defined," are not appropriate to describe the work of an engineer. How could an engineer, who has pointed with pride to projects which have "doubled the production of the company," defend himself against nebulous phrases such as "confused or poorly defined"? If the court will not accept the word of all the witnesses that the machines are working well, then the only alternative would be to bring the machines into court or take the court to the machines. This dilemma points up the other "burden of proof" proposition urged by CONOCO - if CONOCO refused to produce any designs they allege to be "shallow," how could the plaintiff prove that they were not shallow? After CONOCO refused to produce the alleged faulty designs, the plaintiff countered the attack in the only way left available to him - he produced engineers who testified that his designs were "more thorough than most of them" (T. 346), and "very thorough," (T. 376)

The Fifth Circuit was not certain that the trial judge arrived at the correct conclusion, but it was not willing to overturn his decision. The appeals court restated the rule held in that circuit regarding the defendant's burden: "The employer does not have to show the legitimate reason for discharge by a preponderance of the evidence, rather he merely has come forward with relevant evidence, to satisfy his burden of production." *Marshall v. Westinghouse Electric Corp.* 582 F.2d at 967, and that the plaintiff has the burden of persuasion at all times. Thus, the appeals court said that "Harpring's contention that CONOCO failed to meet its burden by merely articulating that it discharged Harpring for good cause is thus without merit." (Appendix A).

Thus, the Fifth Circuit held that even though the company was exclusively in possession of the alleged "inadequate performance evidence (i.e. faulty designs and equipment), it did not have to produce any of the evidence - but that it was sufficient for the company officials to articulte conclusions concerning the petitioner's performance. The petitioner's dilemma was illustrated during the cross-examination of a company official at T. 588:

> *Question:* Do you have any examples of his poor work or work that was considered to be substandard? Do you have any examples of that?
>
> *Mr. Michels:* Yes
>
> *Question:* Do you have them here?
>
> *Mr. Michels:* No.
>
> *Question:* Now, the machines and the gadgets that you described as being poorly done are all working out at the plant making money for CONOCO, aren't they?
>
> *Mr. Michels:* Yes, they are

What more could an employee do? Five engineers had testified to his competence, and even the company officials admitted that the machines he developed were making money for the company. Is he to be required to take the court to the machines?

The courts of appeal are in disagreement as to the defendant's burden in a discrimination case. Some courts hold that the defendant's burden is one of "production" or "going forward with the evidence," rather than a burden of persuasion which they emphasize remains with the plaintiff throughout. *Long v. Ford Motor Co.*, 496 F.2d. 500 (6th Circuit 1974); *Sweeny*

v. Board of Trustees, 569 F.2d 169 (1st Cir. 1978). However, many courts have held that when a plaintiff makes a prima facie case, the burden of proof and persuasion shifts to the defendant to justify its discriminatory practice or to prove there is no impermissible discrimination. *Vulcan Soc. of New York City Fire Dept., Inc. v. Civil Service Com.*, 490 F.2d 387 (2nd Cir. 1973); *Holthaus v. Compton and Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975).

The petitioner suggests that in the case at hand, where the defendant company is solely and exclusively in possession of the alleged "inadequate performance evidence," that "production" or "going forward" with the evidence means something more than mere articulation. Otherwise, there would be no way a plaintiff could prove his case.

This Court is respectfully urged to hear this case and clarify the meaning of the terms "production," and "going forward with the evidence," especially in those situations where the relevant evidence is exclusively within the control of the defendant company.

Respectfully submitted,

WILLIAM M. PACE
Attorney for Petitioner

CERTIFICATE OF SERVICE

In compliance with the Rules, I certify that I have served three copies of the above petition for writ of certiorari upon Jan P. Patterson, Esquire, attorney for respondent, P.O. Box 663, Aberdeen, Mississippi 39730, by first class mail.

This the 7th day of April, 1981.

WILLIAM M. PACE

APPENDIX A

Jerome W. HARPRING,

Plaintiff - Appellant,

v.

CONTINENTAL OIL COMPANY,

Defendant Appellee

No. 79-2934

Summary Calendar.

United States Court of Appeals

Fifth Circuit.

Unit A

Oct. 16, 1980.

Plaintiff brought suit against his former employer charging age discrimination. The United States District Court for the Northern District of Mississippi, at Aberdeen, Orma R. Smith, J., rendered judgment in favor of former employer, and plaintiff appealed. The Court of Appeals, Sam D. Johnson, Circuit Judge, held that: (1) district court's holding that age was not cause of plainitff's discharge was not one that on the entire evidence left Court of Appeals with definite and firm conviction that mistake had been committed; (2) district court did not abuse its discretion in excluding testimony of former employee within protected age group on how second-level review was

applied to employees under his supervision; (3) graphic charts of employee performance ratings, showing bell-shaped curves, was cumulative, and district court did not abuse its discretion in excluding it; and (4) while evidence of plaintiff's nonwork income and assets was irrelevant to issue of employer's liability for age discrimination, error in its admission was harmless.

Affirmed.

1. Labor Relations 20.10

Plaintiff makes out prima facie age discrimination case when he shows that he belongs to statutorily protected age group, was qualified for job, was discharged, and was replaced by a person outside protected group. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

2. Labor Relations 20.10

Once prima facie case of age discrimination is made out, employer then has burden to produce evidence tending to show that employee was discharged for legitimate, nondiscriminatory reason such as good cause; employer does not have to show legitimate reason for discharge by preponderance of evidence, rather he has to come forward with relevant evidence to satisfy

his burden of production. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

3. Labor Relations 20.10

Because plaintiff in age discrimination suit retains burden of persuasion at all times, it is incumbent upon plaintiff to rebut employer's assertion of legitimate reason by showing, on preponderance of evidence, that stated reason for discharge is a mere pretext or cover-up for discriminatory discharge. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

4. Federal Courts 850

Appellate courts can reverse district court's subsidiary fact-findings and credibility choices only when they are clearly erroneous.

5. Federal Courts 865

Although there was conflicting evidence on whether employer impermissibly discharged employee, there was sufficient evidence in the record for Court of Appeals to conclude that, while district court's finding that age was not cause of employee's discrimination was not necessarily correct, it was not

one that on entire evidence, left Court of Appeals with definite and firm conviction that mistake had been committed. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1).

6. Labor Relations 20.10

Testimony of similarly situated employees and reasons for their discharge are relevant in proving pattern and practice of age discrimination. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1), Fed. Rules Evid. Rule 401, 28 U.S.C.A.

7. Federal Courts 823

Exclusion of evidence in age discrinination cases as irrelevant or as relevant but outweighed by other considerations is to be reversed only if it was an abuse of discretion. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1); Fed.Rules Evid. Rules 401, 403, 404(b), 28 U.S.C.A.

8. Labor Relations 20.10

In age discrimination suit, district court did not abuse its discretion in excluding testimony of former employee within

protected age group on how second-level review was applied to employees under his supervision, since plaintiff had been allowed to introduce statistical evidence to make his case on pattern and practice and specific examples would have been cumulative of that statistical evidence. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1); Fed.Rules Evid. Rule 403, 28 U.S.C.A.

9. Labor Relations 20.10

In age discrimination suit, graphic charts of employee performance ratings, showing bell-shaped curves, was cumulative, and district court did not abuse its discretion in excluding it. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1); Fed.Rules Evid. Rule 403, 28 U.S.C.A.

10. Federal Courts 896

In age discrimination suit, while evidence of plaintiff's nonwork income and assets was irrelevant to issue of former employer's liability for age discrimination, error in its admission was harmless to plaintiff. Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1); Fed.Rules Evid. Rule 103, 28 U.S.C.A.

Appeal from the United States District Court for the Northern District of Mississippi.

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

Appellant Harpring, a man in his early fifties, appeals from the district court judgment in favor of his former employer, appellee Continental Oil Company (Conoco), in a 29 U.S.C.A. § 623(a)(1) age discrimination suit. Harpring contends that the district court was clearly erroneous in finding that age was not the cause of his discharge. This Court affirms the district court.

Harpring's version of the facts paints a picture of an employee who, after his employer had given him a job to do, was then shackled by his employer from effectively carrying out his duties. Harpring was hired as a senior process engineer at a Conoco chemical plant in Aberdeen, Mississippi. The chief process engineer, Mr. Michels, allegedly assumed direct supervisory control over all junior engineers, a function that Harpring claimed he had been hired to do. Harpring also claimed that, after he had received a lowered performance rating that meant discharge in ninety days unless his performance improved, he had been given more assignments than he could complete within a given lengh of time.

The version of the facts set forth on behalf of Conoco by Michels, corroborated in part by other Conoco employees, was that Harpring's work was incomplete, incomprehensible, and generally of poor quality, and that he lacked necessary supervisory and organizational skills. The witnesses for Conoco testified that Harpring's age had nothing to do with Conoco's dissatisfaction and ultimate discharge of Harpring.

Harpring tried to show that though he was qualified for his job, and that his work had been satisfactory, he was a victim of a "youth trend" at the plant. One of the Conoco officials also told the plant manager that there were too many supervisory people at the Aberdeen plant.

Harpring also insisted that a second-level evaluation of employees disproportionately affected more employees in the protected age group and thus was the means by which Conoco effectuated its discriminatory practice. Conoco witnesses, on the other hand, denied that the second level review was ever used at the Aberdeen plant because that plant did not have statistically large goup of employees to conform the second-level review evaluation to a bell-shaped curve on a graph. The Conoco witnesses did state that the second-level review appeared to adversely affect employees ages forty to sixty-five: the ratings of engineers only six months out

of school were raised in the second-level evaluation to compensate for their inexperience so as to more equitably compare their skills with those of experienced engineers. The Conoco witnesses also stated that while age was never discussed in employee performance reviews, the dates of birth of the employees are on the evaluation forms.

During the bench trial, the court permitted Harpring's counsel to draw a bell-curve on the blackboard, but refused to allow Harpring's counsel to introduce bell-curve charts in rebuttal four months after the trial of the case in chief. Over Harpring's objection, Harpring was also required to testify about his assets and non-work income. The court further refused to allow him to introduce testimony about details of why a former Conoco employee in the protected age group was discharged, although evidence that the witness had been involuntarily discharged was introduced.

The district court found that while Harpring had made out a prima facie case of age discrimination, Conoco had successfully defended by stating a legitimate, nondiscriminatory justification for the discharge, and that Harpring had failed to show that the stated reason was a mere pretext for discharging him on the basis of his age. Harpring contends that the district court

committed error because Conoco failed to prove by a preponderance of the evidence that Harpring was discharged for good cause, and because Harpring had proven a pattern and practice of age discrimination that resulted in his discharge. Harpring also contends that the court erred in admitting the evidence concerning his non-work income and assets, in excluding the evidence in the form of bell-curve charts, and in excluding the testimony of the former Conoco employee concerning the circumstances of that witness' discharge.

[1] In this Circuit, plaintiff makes out a prima face age discrimination case when he shows that he (1) belongs to the statutorily protected age group, (2) was qualified for the job, (3) was discharged, and (4) was replaced by a person outside the protected group. *Price v. Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir. 1977). *But see McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980) (abolishing fouth requirement in age discrimination cases).

[2,3] Once the prima facie case is made out, the employer than has the burden to produce evidence tending to show that the employee was discharged for a legitimate, nondiscriminatory reason such as good cause. *Marshall v. Westinghouse Electric Corp.*, 582 F.2d 966, 967 (5th Cir. 1978); *Marshall v. Westinghouse Electic Corp.*, 576 F.2d 588, 590-92 (5th Cir.),

aff'd, 582 F.2d 966 (5th Cir. 1978) (en banc). *Price v. Maryland Casualty Co,*. 561 F.2d at 612-13; *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977); *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975); *Moore v. Sears, Roebuck & Co.* 464 F.Supp. 357, 363 & n. 8 (N.D.Ga. 1979). The employer does not have to show the legitimate reason for discharge by a preponderance of the evidence, rather he merely has come forward with relevant evidence to satisfy his burden of production. *Marshall v. Westinghouse Electric Corp.*, 582 F.2d at 967;*Marshall v. Westinghouse Electric Corp.*, 576 F.2d at 591-92; *Bittar v. Air Canada*, 512 F.2d at 582-83. *See Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d 58, 61 (10th Cir. 1979). Because the plaintiff retains the burden of persuasion at all times, it is incumbent upon the plaintiff to rebut the employer's assertion of a legitimate reason by showing —on a preponderance of the evidence—that the stated reason is a mere pretext or cover-up for a discriminatory discharge. *Marshall v. Westinghouse Electric Corp.* 576 F.2d at 590-92; *Bittar v. Air Canada*, 512 F.2d at 583; *Moore v. Sears Roebuck & Co.*, 464 F.Supp. at 363 *See Loeb v. Textron, Inc.* 600 F.2d 1003, 1011-12 (1st Cir. 1979); *Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d at 61. Harpring's contention that Conoco failed to meet its burden by merely articulating that is discharged Harpring for good cause is thus without merit.

[4,5] Because Conoco met its burden of production, the question central to this case whether Harpring showed by

a preponderance of the evidence that the stated reason was pretextual because Conoco engaged in a pattern and practice of discrimination or had discharged this particular employee on impermissable age grounds. The district court held that Harpring failed to meet his burden of persuasion. Appellate courts can reverse the district court's subsidiary fact findings and credibility choices only when they are clearly erroneous. *Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 690 (5th Cir. 1979); Fed.R.Civ.Proc. 52(a). Although there is conflicting evidence on whether Conoco impermissibly discharged appellant, there is sufficient evidence in the record for this Court to conclude that while the district court holding may not necessarily be clearly correct, it is not one that "on the entire evidence [leaves this Court] with the definite and firm conviction that a mistake has been committed." *Ranirez v. Sloss*, 615 F.2d 163, 166 (5th Cir. 1980) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948)).[1]

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1. Harpring has levelled the serious charge that Conoco involuntarily discharges a professional employee approximately every six months, ensuring that each case would be a one-on-one—rather than class—confrontation with the corporation because notice of intent to sue must be filed with the Secretary of Labor within 180 days of the alleged unlawful practice. 29 U.S.C.A. § 626(d). *See generally LaChapelle v. Owens—Illinois, Inc.* 513 F.2d 286 (5th Cir. 1975); *Price v. Maryland Casualty Co.*, 62 F.R.D. 614 (S.D.Miss.1972). Such a practice, if true, would silute the litigation strength Conoco must oppose. Manupulation of the jurisdictional prerequisities is a proper matter for the Secretary of Labor to investigate. 29 U.S.C.A. §§ 624, 626(a) & (b), 632. The district courts should also be on guard against such manipulation. *See Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 785, 788-90 (5th Cir. 1980) (equitable tolling of notice filing requirement).

Harpring also raises three evidentiary objections. The most serious is to the testimony limitation on a former Conoco employee within the protected age group. This witness was to explain how the second-level review resulted in his involuntary discharge. The court excluded the details of that witness' review application on the ground of not trying another age discrimination lawsuit. The court did allow the witness to testify on how the second-level review was applied to employees under his supervision. The witness stated that he participated in only one second-level review, that of an employee within the protected age group, and that the evaluation for that employee was lowered. Harpring intended to call an additional witness to testify on how the second-level review was applied to that second witness' involuntary discharge. In light of the testimony limitation on the first witness, Harpring did not call the second witness. Harpring was able to introduce statistical evidence to prove up a pattern and practice discrimination, and intended to call only these two witnesses to provide specific examples of similar treatment of similarly situated employees.

[6,7] It is clear that the testimony of the similarly situated employees and the reasons for their discharge are relevant in proving a pattern and practice of age discrimination. *Schulz v. Hickok Manfacturing Co.*, 358 F.Supp. 1208, 1212 (N.D.Ga. 1973); FedR.Evid.401. See also Fed.R.Evid. 404(b). The district court, however, is empowered with discretion to exclude

relevant evidence if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Fed.R.Evid. 403. Exclusion of evidence in age discrimnation cases as irrelevant or as relevant but outweighed by other considerations is to be reversed only if it was an abuse of discretion. *Wilson v. Sealtest Foods Division of Kraftco Corp.*, 501 F.2d 84, 87 (5th Cir. 1974).

[8] Although the district court—apparently for waste of time—excluded the testimony of Harpring's witness because it would involve trying another lawsuit within the existing lawsuit, it also appears to this Court that the excluded testimony on the application of the second-level review to that witness would have been cumulative evidence. Harpring intended to call only two witnesses to provide specific examples of the alleged pattern and practice of age discrimination. Harpring was allowed to introduce statistical evidence to make his case on pattern and practice. Therefore the specific examples would have been cumulative of the statistical evidence. Has Harpring been unable to produce statistical evidence to show a pattern and practice of discrimination, then specific examples would have clearly been both relevant and non-cumulative. But that is not the case here. [2] This Court thus finds that the district court did not abuse its discretion.

2.Harpring is not claiming that the excluded testimony was necessary to explain how the second-level review operated in general, rather he is claiming that the excluded testimony was necessary to specifically illustrate how the second-level review was used to effectuate a pattern and practice of discrimination. Even if Harpring had claimed that the testimony on the specific

[9] Harpring's second objection is that the exclusion of graphic charts of employee performance ratings–showing bell–shaped curves–was erroneous. The judge excluded this evidence on the ground that it was testimony that would probably have been admissible in chief, but that to admit it at this juncture would permit if not necessitate the defendant to take it, analyze it, and reply to it, opening up the case again. Without determining whether the judge's reasons for his ruling are correct, it appears that because the graphic evidence was cumulative the district court did not abuse its discretion. Fed. R.Evid. 403.

[10] Harpring's final point is that he was required to testify, and the court admitted the testimony, about his non–work income and assets. This Court finds the admission not to be reversible error because, while the evidence was irrelevant to the issue of defendant's liability for age discrimination, the error was harmless. Fed.R.Evid. 103.

For the foregoing reasons, the district court is

AFFIRMED.

Note 2 –Cont'd.
application of the evaluation to the witness was necessary to show how the second-level review operated in general, that argument would have been without merit. The witness did testify on the specific application of the second-level review to employees under that witness' supervision, a situation in which the witness was much more familiar with the application of the second level-review than when it had been applied to him.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JEROME W. HARPRING,

Plaintiff - Appellant,

v. NO. 79-2934

CONTINENTAL OIL COMPANY, INC.,

Defendant - Appellee

APPELLANT'S MOTION FOR

PANEL REHEARING

Plaintiff-Appellant (Harpring) moves the panel to reconsider its decision concerning the "burden of production" required of a defendant company in an ADE Act case. Defendant CONOCO alleged two principal "good cause" reasons for its different treatment of plaintiff– – that he failed to supervise junior engineers and that his designs for equipment were shallow and ill defined. CONOCO refused to present any junior engineers to corroborate that and would not produce any designs prepared by Mr. Harpring to demonstrate their inadequacy.

By contrast, Mr. Harpring presented two junior engineers who testified that they were not assigned to be supervised by Mr. Harpring and five professional engineers testified that his performance as an engineer was competent, especially his design work.

CONOCO's defense evidence consisted solely of oral testimony by the same officials charged with the discrimination, that they had not discriminated against plaintiff and that his supervision and design work were inadequate. In racial discrimination cases the Supreme Court has held that "affirmation of good faith" was simply not adequate to dispel a prima facie case of systemic exclusion. *Alexander v. Louisiana*, 405 US 625.

Plaintiff Harpirng actively sought objective evidence from CONOCO, in order to rebut it, that his performance was inadequate. None was forthcoming. CONOCO was in possession of these alleged sub-standard items i.e. designs, machinery, and they could not be presented by the plaintiff or submitted for expert appraisal.

The Fifth Circuit has differentiated between racial and age discrimination cases - - holding, essentially, that the burden of proof is somewhat "lighter" for an age discrimination defendant. *Marshall v. Westinghouse Electric Corporation*, 576 F.2d 589 (5th Cir. 1978); however, even in those cases, the Court has required the defendant to demonstrate reasonable factors other than age for the plaintiff's discharge: "This circuit has consistently held that once the plaintiff makes out a prima facie case the defendant bears the burden of 'going forward' to demonstrate reasonable factors other than age for the plaintiff's discharge."

The alleged differentiating factors and evidence were within CONOCO's possession and control - - not the plaintiff's. CONOCO's burden of "going forward" or "production" was not demonstrated merely by articulations from the management officials allegedly responsible for the discrimination.

Plaintiff respectfully urges the panel to reexamine its opinion and to decide, as a matter of law, that where the defendant company alleges objective inadequacy i.e. faulty designs, that the company has not met its burden of "production" or demonstration" merely by oral articulations - - especially when the plaintiff has established a pattern and practice of age discrimination and has presented substantial evidence of his competence.

Respectfully submitted

William M. Pace
Attorney for Plaintiff-Appellant
P.O. Box 112
Aberdeen, Mississippi 39730
601-369-2310

CERTIFICATE OF SERVICE

I hereby certify that I ahve this date mailed a copy of Appellant's Motion for Panel Rehearing to counsel for defendant, Jan Patterson, Esquire, P.O. Box 663, Aberdeen, Mississippi.

This the 27th day of October, 1980.

WILLIAM M. PACE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-2934

JEROME W. HARPRING,
Plaintiff-Appellant,

versus

CONTINENTAL OIL COMPANY,
Defendant-Appellee.

Appeal form the United States District Court for the
Nothern District of Mississippi

ON PETITION FOR REHEARING
(January 21, 1981)

Before AINSWORTH,GARZA, and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/S/ Sam D. Johnson
UNITED STATES CIRCUIT JUDGE

(filed: Jan. 21, 1981)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

(filed July 16, 1979)

JEROME W. HARPRING,
Plaintiff

v. NO. EC 77-192-S-O

CONTINENTAL OIL COMPANY,
Defendant

MEMORANDUM OF DECISION

The action sub judice had been tried without a jury and submitted to the court for decision. This memorandum will contain the court's findings of fact and conclusions of law required by Rule 52(a), Fed. R. Civ. P.

The plaintiff, Jerome W. Harpring was employed by defiendant Continental Oil Company as a senior process engineer at its Aberdeen, Mississippi, plant sometime in September or October, 1974. He bagan the duties of his employment at the plant on November 1, 1974. Plaintiff was terminated by defendant on August 1, 1977.

At the time he was discharged, plaintiff was 50 years of age and within the age group afforded protection by the Age Discrimination in Employment Act, 29 U.S.C., § 621, et seq. (ADEA).

Defendant is an employer engaged in interstate commerce employing more than 25 persons and is subject to provisions of ADEA.

Plaintiff contends that defendant violated the provisions of ADEA when he was terminated because his discharge was brought about on the account of his age.[1] Plaintiff seeks, by this suit, reinstatement and damages for defendant's violation of the Act.

Defendant relys upon the provision of the Act which provides that "[i]t shall not be unlawful for an employer - - to discharge- - an individual for good cause". - 29 U.S.C. § 623(f)(3).

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1. 29 U.S.C. § 623(a) provides:
(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2)to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee inorder to comply with this chapter.

The court has juridsiction of the parties and subject matter. Plaintiff notified the Department of Labor, as ADEA requires, before commencing the action.

Plaintiff was required to prove that defendant discharged him because of his age. *Wilson v. Sealtest Foods Division of Kraftco Corp.*, 501 F.2d 84, 86 (5th Cir. 1974).

To sustain his burden of proof, plaintiff offered evidence that his work was of the highest quality, that his performance was adequate, and that he complied with all directives received from supervisory personnel.

Plaintiff also offered evidence that defendant started a "Youth Movement" at its Aberdeen plant, designed to weed out older professional employees and replace them with younger people.

A compliance officer with the United Stated Department of Labor, Wage and Hour Division, made a study of the Aberdeen plant. A chart prepared by him indicated that the non-protected age group received more favorable reviews that the protected age group in the system adopted by defendant to evaluate its professional employees. Thus, plaintiff contends that such reviews sustain his position that a "youth movement" designed to eliminate the older group of professional employees was active and in progress within the plant.

Plaintiff also introduced evidence through former fellow-workers that he efficiently performed his duties and that there was no justifiable reason to question his competency.

Statistical evidence was also introduced showing that during the period October, 1974 to August, 1977, the average age of all process engineers in the plant dropped from 40.8 years to 27.1 years; that of the six management-professional employees terminated, four were terminated for "inadequate performances" and two for "reduction of force". The four terminated, for "inadequate performance" were 40 years of age or more and, as of December 31, 1977, the average age was 50.2 years.

Statistical evidence was also received reflecting that after a change in management at Aberdeen in the fall of 1974, there was a reduction in the average age of management-professional engineers of approximately 10 years, from 45.2 years to 35.3 years.

Defendant, on the other hand, through its personnel records covering the time of plaintiff's employment, produced evidence that plaintiff's work was unsatisfactory from the beginning and despite counseling and efforts to improve plaintiff's performance, such could not be accomplished.

It is material to note that defendant, as of the time of the trial, had not employed any person to take the position vacated by plaintiff.

The evidence introduced by plaintiff was sufficient to sustain the burden placed on him to make out a prima facie case of age discrimination. *Wilson v. Sealtest Food Division of Kraftco Corp., supra.* The action having been fully tried with both parties introducing evidence to sustain their respective positions, the court must now determine whether from all the evidence, plaintiff has shown that he was discharged because of his age. The court finds that he has not.

The evidence shows that from the very first plaintiff's supervisor was critical of his work. His supervisior, Douglas Michels, in a November, 1975 report, had this to say about plaintiff's effectiveness as a supervisor:

> He has not demostrated he is an effective supervisor. His process design work tends to be shallow and incomplete. Tends to "forger" assignments unless constantly pushed. He has worked extra hours only occasionally and seems to try to avoid any real responsibility. He has a negative opinion of Conoco's operation and is too critical of others.

In September, 1976, plaintiff was counseled by Michel about the deficiences in his job performance and was advised that continued employment would require marked improvement in the areas discussed during the counseling period.

Michel's 1976 report on December 9, 1976, commented on plaintiff's work performance as follows:

> Jay's work performance does not justify his salary. He does not supply sufficient supervision to insure his engineers produce satisfactory results. His own work is disorganized and hard to understand. He does not take enough interest in plant problems or effectively interact with operations. He does not identify plant needs himself but only reacts when given a specific assignment. He assumes no responsibility for plant performance. His designs are considered by me to be less than adequate. He has not familiarized himself with Conoco methods or terminology.

Again, on January 21, 1977, Michels had a counseling session with plaintiff. His interoffice communication includes an evaluation of plaintiff's work performance, as follows:

> Since this last counseling session, Mr. Harpring's job performance has shown no identifiable improvement. Because marked improvement was necessary and not achieved. Jay was given a "5" rating. This rating means that Jay will be terminated if significant improvement in major areas is not made within the next three months.
>
> At the previous counseling session, Mr. Harpring's job responsibilities were clarified. Areas where deficiencies existed and improvements needed were pointed out and documented.
>
> The current situation represents our final attempt to obtain satisfactory performance for Jay. We have laid

> out a detailed work requirement schedule which must be met. This schedule is attached. I want to emphasize that this schedule represents a performance minimum for continued employment. Also it is assumed other areas of required job performance will, at the least, be maintained at the present level.

Again, the interoffice communication by Michels of his counseling conferen e with plaintiff on February 24, 1977, indicates his displeasure with progress made by plaintiff in the critical portions of his work.

The records maintained by defendant reflect a determined effort on the part of management to bring defendant's job performance to a satisfactory level - - but that such could not be accomplished.

Plaintiff contends that the company records relating to his job performance were created for the purpose of justifiying his termination; that the facts recorded do not reflect the true situation. That is to say, that the records consititue a pretext for discharging him, when the real reason is his age.

Assuming arguendo, but without deciding, that once plaintiff made out a prima facie case, the burden shifted to defendant to show that age did not have a part in its

decision to terminate plaintiff, the court finds that defendant has met that burden by showing that the termination was for a good cause.

The clerk will enter judgment for defendant; plaintiff to be taxed with the costs.

This the 11th day of July, 1979.

/S/ Orma R. Smith

UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

JEROME W. HARPRING,

Plaintiff

v. NO. EC 77-192-S-O

CONTINENTAL OIL COMPANY,

Defendant

FINAL JUDGMENT

This action came on for trial before the Court, Honorable Orma R. Smith, District Judge, presiding, and the issues having been duly rendered,

It is Ordered and Adjudged

That the plaintiff, Jerome W. Harpring, take nothing, that the action be dismissed on the merits, and that the defendant, Continental Oil Company, recover of the plaintiff, Jerome W. Harpring, its costs of action.

Dated at Oxford, Mississippi, this the 11the day of July, 1979.

NORMAN L. GILLESPIE, Clerk

By: /S/ Margaret E. King

Margaret E. King, Deputy Clerk